85-2050

No. .....

Supreme Court, U.S.
FILED
JUN 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

—o—

WILLIAM ELIZEY,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

—o—

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QUESTION PRESENTED FOR REVIEW

I. Did the trial court err in entering conviction and refusing to grant petitioner's acquittal motions where such refusal amounted to a violation of due process in that the prosecution did not provide evidence sufficient to carry its burden of proofs?

II. Did the trial court err in submitting to the jury the factual issue of whether petitioner was guilty of grand theft and in subsequently entering a conviction for grand theft: (A) Where as a matter of law a conviction of grand theft was clearly against the manifest weight of the evidence, and/or (B) Where petitioner's motion for a judgment of acquittal should have been granted?

III. Did the trial court deny the defendant a fair trial by becoming an advocate for the prosecution when it questioned petitioner and others?

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Petitioner prays that a writ of certiorari issue to review the judgment of the Ohio Supreme Court entered in the above-entitled case on March 19, 1986.

CITATIONS TO OPINIONS BELOW

The opinion of the Ohio State Court of Appeals for the Eighth District is unreported.

The opinion of the Ohio Supreme court is unreported as of this date.

JURISDICTION

The judgment sought to be reviewed by the petition was rendered and entered on March 19, 1986. This petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Ohio Revised Code § 2901.05

Ohio Revised Code § 2913.02

STATEMENT OF THE FACTS

On February 18, 1983, petitioner, a high ranking official in purchasing, was summarily fired by his superiors at Picker Corporation (T. 1258-1260 and 1026). Two months after the termination, Picker Corporation conducted an audit in which appellant's records became the central focus (T. 879, 919 and 1539). This secretive audit was conducted by Picker Corporation auditors, as well as "outside" auditors (T. 1648). All of petitioner's records were pulled, taken away, and there is no evidence that any or all were replaced (T. 1205 and 1664). The same people who were involved in the search of these files were also responsible for appellant's firing (T. 1663). At some later date, the Highland Heights Police Department was contacted by Picker and an investigation was commenced (T. 1668).

Stipulated evidence at trial showed that Picker Corporation was involved in a multi-million dollar contract dispute with Hughes Aircraft (T. 1509). Uncontroverted testimony indicated that petitioner, the highest ranking black official at Picker, was Picker's "liaison" with Hughes and became the central figure in the intercorporate dispute (T. 953). Moreover, petitioner maintained contact with Hughes even after Picker attempted to cancel a $2,000,000.00 contract and despite potential litigation (T. 1018-1019). It was also undisputed that, prior to petitioner's firing, he was demoted shortly after he advised Picker's corporate counsel that he would testify, if at all, on behalf of Hughes (T. 1021-1024). Prior to petitioner's firing, it is also undisputed that one of his superiors threatened the petitioner's continued employment, and referred to the petitioner as the "smart ass nigger." (T. 1029).

While at Picker Corporation, petitioner made purchases, along with other buyers pursuant to "requisitions." (T. 54 and 217). One Picker, John Volpe, requisitioned a Model 401, 4 channel dimension system (hereinafter "401") (T. 221). While petitioner recalled a second 401 being requisitioned, Volpe did not (T. 226). However, Volpe admitted at trial that his requisition book may well have been borrowed and that others, including his secretary, may have sometimes requisitioned items in his name (T. 243-245). While Volpe checked records at Picker Corporation, he could find no evidence of having requisitioned *either* 401, as both his requisition book and receipts could not be located—possibly lost in a move (T. 275-276. 284, 387 and 447).

During the trial itself, however, Volpe's ex-secretary, called by the petitioner, was able to find a copy of the purchase order for the second 401 in a box of files (T. 1209). Albert Kemp, another of petitioner's superiors involved in both the record search and firing, admitted to the court that the purchase order was "made from a requisition." (T. 1264). Gary Patterson, the supervisor who actually fired petitioner, admitted that a purchase order could not be filled out without the information contained in a requisition (T. 335, 394-395, 448-449). Although one of Picker's auditors found a blank requisition with the same serial number as that said to be used in the disputed second 401 transaction (T. 198-115), there was agreement that serial numbers were duplicated (T. 1271), and also evidence that different Picker locations had their own respective requisition books (T. 1337, 1345, 1354-1355). Finally, evidence was uncontroverted that the blank requisition offered into

evidence may have come from the wrong set of books (T. 1386).

Overwhelming evidence pointed to the actual delivery of the second 401 to Picker Corporation docks by the co-defendant. A packing list for a 401 was signed by Picker Traffic Manager, Dwight Liggett, and date stamped with a Picker stamp (T. 627). The driver who delivered the second 401 recalled the details of delivering the 401 to Picker and, as well, the former secretary of the vendor clearly recalls the delivery and return of the signed and stamped invoice on April 2, 1982 (T. 795-797). Evidence further indicated that the dock was run in a disorganized fashion (T. 844-845), that shipping was in a confused state (T. 248), that items were lost on the Picker dock (T. 1608), and that the Traffic Manager who signed and stamped the 401 invoice at issue and along with Tim Woods who was involved in shipping the 401 were both fired on August 17, 1982.

Payment to the vendor, a co-defendant, was made by Picker Corporation (T. 112). When the vendors produced the signed/stamped invoice showing that the 401 had been delivered to Picker Corporation docks, a receiving ticket was issued to replace the original missing receivers (T. 874-875). Petitioner attempted to encourage timely payment to the vendor, but was not actually involved in getting payment to the vendor, nor did petitioner receive any payment from the vendor (T. 908).

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT ERRED IN ENTERING A CONVICTION AND REFUSING TO GRANT PETITIONER'S ACQUITTAL MOTIONS WHERE SUCH REFUSAL AMOUNTED TO A VIOLATION OF DUE PROCESS IN THAT THE PROSECUTION DID NOT PROVIDE EVIDENCE SUFFICIENT TO CARRY ITS BURDEN OF PROOF.

Under R.C. Section 2913.02, a person is guilty of theft *only* if they have knowingly obtained or exerted control over property or services with purpose to deprive the owner of such by deception, threat, without consent or beyond any implicit or express consent. The evidence at trial supports a finding that $13,103.00 was paid by Picker Corporation *to the co-defendant vendor* only. Thus, the instant issue must focus upon whether the evidence at trial was sufficient to prove that *petitioner* obtained control over such money as an *accomplice* by deception or otherwise (T. 7 and 16).

In *In re Winship*, 397 U.S. 358 (1970), the U.S. Supreme Court held this evidentiary requirement to be a constitutional right. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court held that a jury instruction on reasonable doubt did not fulfill this requirement.

In the State of Ohio, where a plea of not guilty is entered, the state is required to prove all material facts of the crime, including those relating to the corpus delicti. *State v. Nutter*, 22 Ohio St. 2d 116, 258 N.E.2d 440, 441, Syllabus (1970).

Where circumstantial evidence alone is relied upon to prove an essential element of the crime, such evidence must be "irreconcilable" with any reasonable theory of inno-

cence in order to support a finding of guilt. *State v. Kulig,* 37 Ohio St. 2d 157, 309 N.E.2d 897 (1974).

A reasonable theory of petitioner's innocence arises from the evidence when viewed in a light favorable to the prosecution, i.e., that even if the co-defendant was involved in a theft offense, the petitioner was, at worst, an unknowing pawn.

In *State v. Sorgee,* 54 Ohio St. 2d 464, 377 N.E.2d 782 (1978), the Ohio Supreme Court reversed a criminal conviction and held that an appellate court will reverse a conviction based solely on circumstantial evidence where that evidence does not, as a matter of law, preclude all reasonable theories of innocence.

At bar, no such evidence exists.

In *State v. Gossett,* 269 N.E.2d 634 (Cuyahoga Cty. Court of Common Pleas, 1971), evidence was insufficient to exclude every reasonable hypothesis of innocence.

II. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE FACTUAL ISSUE OF WHETHER PETITIONER WAS GUILTY OF GRAND THEFT AND IN SUBSEQUENTLY ENTERING A CONVICTION FOR GRAND THEFT: (A) WHERE AS A MATTER OF LAW A CONVICTION OF GRAND THEFT WAS CLEARLY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND/OR (B) WHERE PETITIONER'S MOTION FOR A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

An appeal claiming that a judgment is against the weight of the evidence is different from an appeal based on the argument that the evidence was insufficient to con-

vict. The sufficiency argument requires that evidence presented, if believed, support a conviction. Weight, on the other hand, goes to the quality of the evidence. In *Tibbs v. Florida,* — U.S. —, 102 S. Ct. 221 (1982), the United States Supreme Court explained the difference between the two contentions. *Tibbs* held that when the weight of the evidence is argued, the viewing court must consider the credibility of the state's case, even if sufficient evidence had been presented to persuade a jury to convict. *United States v. Lincoln,* 630 F.2d 1313, 1319 (8th Cir. 1980), *quoted with approval in Tibbs,* 102 S. Ct. at 2216, n. 11. *Squire v. Cleveland,* 150 Ohio St. 303, 348, 82 N.E. 709 (1948). Even if the court finds sufficient evidence to sustain a verdict, it must reverse when the verdict is against the weight of the evidence. *State v. Robinson,* 162 Ohio St. 486, 487, 124 N.E. 148 (1955).

Thus, in consideration of uncontroverted evidence, conflicting evidence, and especially in consideration of what was not proved, petitioner's conviction for grand theft should be reversed. *State v. Gaston,* No. 37845 (8th App. Dist. Jan. 11, 1979, unreported).

THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE FACTUAL ISSUE OF WHETHER PETITIONER WAS GUILTY OF GRAND THEFT AND IN SUBSEQUENTLY ENTERING A CONVICTION FOR GRAND THEFT WHERE PETITIONER'S MOTION FOR A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

Employing the above analysis, it was error for the trial court to deny petitioner's motions for an acquittal. Rule

29(A) of the Ohio Rules of Criminal Procedure provides that:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, *shall order* the entry of a *judgment of acquittal* of one or more offenses charged in the indictment, information, or complaint, *if the evidence is insufficient to sustain a conviction* of such offenses. [Emphasis added].

§ 2901.05 Burden and degree of proof.

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of reasonable doubt and proof beyond a reasonable doubt, contained in division (D) of this section.

(C) As used in this section, an affirmative defense is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

(D) Reasonable doubt is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human af-

fairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

THEFT

§ 2913.02 Theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat.

III. THE TRIAL COURT DENIED THE PETITIONER A FAIR TRIAL BY BECOMING AN ADVOCATE FOR THE PROSECUTION WHEN IT QUESTIONED PETITIONER AND OTHERS.

Rule 614(B) of the Ohio Rules of Evidence provides:

The court may interrogate witnesses in an impartial manner, whether called by itself or by a party.

In *State, ex rel. Wise v. Chand* (1970), 21 Ohio St. 2d 113, the Ohio Supreme Court explained at syl. 4:

In a jury trial, where the intensity, tenor, range and persistence of the court's interrogation of a witness can reasonably indicate to the jury the court's opinion as to the credibility of the witness or the weight to be given to his testimony, the interrogation is prejudicially erroneous.

See also *State v. Osborn* (Oct. 27, 1983), Cuyahoga App. No. 46631, unreported; *State v. Watkins* (May 24, 1984), Cuyahoga App. No. 47506, unreported; *State v. Cunningham,* No. 48558 (8th App. Dist. Jan. 31, 1985, unreported).

At bar, the court asked wide-ranging and persistent questions of petitioner.

Such inquiries by itself, rise to the "intensity, tenor, range, and persistence" which required reversal in *State, ex rel. Wise v. Chand, supra.*

At a sidebar conference the court made it clear that it wanted the records subpoenaed (T. 1477-1479). Yet, it is clear from a reading of the foregoing questioning by the court *in front of the jury* that the court wants those records introduced into evidence. Without introducing such records, the defense is severely prejudiced by the court. Defense counsel objected to the courts questioning in front of the jury.

> MR. STEIN: I would add, more for the record than anything else, that I think the Court's questioning in open court in front of the jury places undue emphasis on the issue. There is an issue of reliability of Picker in this case, and Picker comes in especially at the Court's request and says it's not there. It adds something to it.
>
> * * *
>
> THE COURT: He says they are there. You both have subpoena power.

(T. 1487-1489). Employing the *Chand* standard, the *intensity, tenor, range, and persistence* of the court's interrogation reasonably can be said to indicate to the jury both

that the court doubted petitioner's credibility and that petitioner's testimony was lesser weight in the court's view.

———o———

CONCLUSION

The petitioner, the highest ranking black official at Picker Corporation, became a central figure between a corporate battle involving millions of dollars. In order to discredit him, Picker proceeded to engage the local police in attempting to show that the petitioner was apparently part of a conspiracy with a black vendor to defraud it. The evidence at trial established overwhelmingly that petitioner could not and did not receive any funds from the transaction involving the sale of a 401 ultrasonic dimension system and that the payment was approved by others at Picker, not the petitioner. His conviction of grand theft was simply not supported by the manifest weight of the evidence and was not established beyond a reasonable doubt.

At best, all evidence against the petitioner was circumstantial and, therefore, insufficient. Overwhelming evidence established petitioner's reasonable theory of innocence. His motion for acquittal was denied.

The trial court's examination of the petitioner was of a nature where the intensity, tenor, range and persistence of the inquiries created with the jury a belief of the court's opinion concerning the credibility of the petitioner and was significantly prejudicial.

———o———

RELIEF ULTIMATELY SOUGHT

Petitioner believes that this Court should rule that the Ohio Court of Appeals and Supreme Court of Ohio erroneously refused to reverse the judgment of the trial court and that the decisions of the Ohio Court of Appeals and Supreme Court of Ohio must, therefore, be reversed.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 49234

STATE OF OHIO

Plaintiff-Appellee

vs.

WILLIAM ELIZEY

Defendant-Appellant

JOURNAL ENTRY

and

OPINION

(Filed Sept. 5, 1985)

DATE OF ANNOUNCEMENT
OF DECISION:

CHARACTER OF PROCEEDING: Criminal appeal from the Court of Common Pleas, Case No. CR-184400

JUDGMENT: Affirmed

DATE OF JOURNALIZATION:

APPEARANCES:

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WIEST, J.:

On July 26, 1983, William Elizey was charged in a five count indictment with grand theft, in violation of R.C. 2913.02; forgery (two counts) and uttering (two counts), in violation of R.C. 2913.31. At the close of the state's case, the court granted defendant's motion for a directed verdict of acquittal as to one count of forgery and one count of uttering. On July 3, 1984, the jury found the defendant not guilty of forgery, but guilty of grant theft and uttering. Elizey's co-defendant, Lawrence Williams, was found guilty by the same jury of grand theft, forgery and uttering. On August 13, 1984, Elizey was sentenced to three concurrent terms of six months imprisonment. This appeal followed.

The appellant makes the following assignments of error:

I. The trial court erred in entering conviction and refusing the grant appellant's acquittal motions where such refusal amounted to a violation of due process in that the prosecution did not provide evidence sufficient to carry its burden of proof.

II. The trial court erred in submitting to the jury the factual issue of whether appellant was guilty of grand theft and in subsequently entering a conviction for grand theft: (A) Where as a matter of law a conviction of grand theft was clearly against the manifest weight of the evidence, and/or (B) Where appellant's motion for a judgment of acquittal should have been granted.

III. The trial court denied the defendant a fair trial by becoming an advocate for the prosecution when it questioned appellant and others.

We affirm.

FACTS

The grand theft alleged a scheme in which Elizey aided and abetted co-defendant Lawrence Williams ("Williams") in obtaining $13,103 belonging to Elizey's employer, Picker International Corporation ("Picker"). Appellant was employed by Picker as a senior buyer from June of 1980 to February, 1983. Picker was under contract with the University of California at San Francisco to construct and install a digital angiography room in the Radiology Department of Moffit Hospital. One item of equipment required in the digital angiography room was a Model 401 4-Channel Ultrasonic Dimension System ("401"). In August of 1981, Elizey, in his position as senior buyer, ordered a 401 from Schuessler and Associates of Cardiff By The Sea, California. Elizey bought it at a cost of $3,540 to Picker. It was delivered to Moffit Hospital and is still being used there. On November 24, 1981, Elizey issued Picker purchase order No. B 84117 to Spectrum Instrument Company, a company owned by co-defendant Lawrence Williams, for a second 401. Elizey met Williams in 1980 when he was looking to buy a house in Cleveland. Williams, who is also a real estate agent, assisted him in finding a place to live. It was only after Williams met Elizey that his company, Spectrum Electronics, began to do business with Picker. Spectrum did between $50,000 and $75,000 worth of business with Picker in 1981 and 1982, and in 1983 did about $80,000 worth. William's main contact with Picker was Elizey. The purchase order shows that the second 401 was requisitioned by John Volpe on Requisition No. 33486; that the unit price for the item was $12,465; and that it was to be shipped to Moffit Hospital, Radiology Department,

University of California at San Francisco. Volpe testified that he never requisitioned a second 401. Jane Quentin, Administrator of the Radiology Department, testified that a second 401 was neither ordered nor received by the Radiology Department. Spectrum Instruments was paid $13,103 for the phantom 401. A search of the records at Picker revealed that requisition form No. 33486 was still in the requisition book, unused. Appellant, in addition to his testimony that the second 401 was requisitioned by Volpe, testified that he was told by Dr. Michael Tesic of Picker that Dr. Margolis of Moffitt Hospital wanted a back-up 401 in case the one purchased from Schuessler failed to perform. Tesic denied any such conversation and denied that a back-up 401 was ever envisioned or required by the contract.

The uttering conviction involved an invoice from Spectrum on which co-defendant Williams forged the writing of another without his consent. Appellant was alleged to have aided and abetted Williams in the uttering of this forged document. Williams wrote on a copy of the original invoice from Spectrum the following words: "Received on 4/6/82 Dr. Lionel Davidson". No doctor with that name was ever employed or associated with Moffit Hospital. With this forged writing to back him up, appellant wrote on the original invoice from Spectrum the following words, "Okay to pay". This was done on May 3, 1982, and on June 2, 1982, Picker issued the check for $13,103 to Spectrum. The check was endorsed and negotiated by Williams.

I and II

The first two assignments of error involve the same issue and can be discussed together.

> "A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eley* (1978), 56 Ohio St. 2d 169.

We are not to weigh the evidence or to attempt to assess the credibility of the witnesses. The jury has already done this. We are to review the record and determine whether there is substantial evidence, regardless of who produced it, to support the jury's verdict.

We must also keep in mind the dictates of *State v. Kulig* (1974), 37 Ohio St. 2d 157. *Kulig* held that where a conviction was supported solely by circumstantial evidence that the evidence must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt.

We have thoroughly reviewed the record and find the jury verdict to be supported by substantial circumstantial evidence. The first two assignments of error are not well taken.

III

Appellant argues that the trial court's questioning of witnesses constitutes prejudicial error. Rule 614(B) of the Ohio Rules of Evidence provides:

> "The court may interrogate witnesses in an impartial manner, whether called by itself or by a party."

Clearly, the court is authorized to question witnesses, provided that it is done in an impartial manner. If counsel believes that the court is not conducting the interrogation in an impartial manner, or that the interrogation in some way violates the defendant's right to due process, Rule 614(C) provides counsel with a method of objecting to the court's interrogation of witnesses. It relaxes the usual procedure for making objections and allows counsel to wait until the "next available opportunity when the jury is not present". Appellant's third assignment of error must fail for two reasons: First of all, counsel did not avail himself of the unique opportunity offered him by Rule 614(C) and failed to object to the court's questioning of the witnesses. Secondly, his failure to object is immaterial because we find the court's interrogation was conducted in an impartial manner and could have been of assistance to the jury in understanding testimony which, at times, was complicated and highly technical. In this case, we believe the trial judge should be commended, not condemned, for his determination in attempting to get to the truth of the matter. The third assignment of error is overruled.

The judgment of the trial court is affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

WILLIAM B. BROWN, P.J.,
Ohio Supreme Court, Retired

and

JOHN R. HOFFMAN, J.,
5th District Court of Appeals
(Both sitting by assignment)
CONCUR

RECEIVED FOR FILING
September 5, 1985
Gerald E. Fuerst, Clerk

By JAC, Dep.

/s/ Mark K. Wiest,
JUDGE

MARK K. WIEST, J., Court of Common Pleas, Wayne County, Ohio

(Sitting by assignment)

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

IN THE OHIO COURT OF APPEALS
FOR THE EIGHTH DISTRICT
CUYAHOGA COUNTY, OHIO

Appeal from the Court of Common Please of
Cuyahoga County; Case No. CR-184400

COURT OF APPEALS NO. 49234

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

WILLIAM ELIZEY,

Defendant-Appellant.

DEFENDANT-APPELLANT'S NOTICE OF APPEAL TO THE OHIO SUPREME COURT

(Filed October 4, 1985)

Defendant-Appellant, WILLIAM ELIZEY, by and through his undersigned counsel, hereby files a Notice of Appeal of the JOURNAL ENTRY and Opinion on September 5, 1985.

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Attorney for Defendant-Appellant

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM

To wit: March 19, 1986

Case No. 85-1672

REHEARING ENTRY
(Cuyahoga County)

State of Ohio,

Appellee,

v.

William Elizey,

Appellant.

It is ordered by the Court that rehearing in this case be, and the same is hereby denied.

/s/ Frank D. Celebrezze
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 19th day of March, 1986.

JAMES WM. KELLY
CLERK

/s/ Daniel J. Crowley
DEPUTY

Supreme Court, U.S.
FILED
JUL 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2058

In the Supreme Court of the United States

October Term, 1985

WILLIAM ELIZEY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. Whether the State presented sufficient evidence to establish each element of the crimes charged beyond a reasonable doubt.

2. Whether a trial court may interrogate witnesses in an impartial manner.

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No. 85-2058

In the Supreme Court of the United States

October Term, 1985

WILLIAM ELIZEY,
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vs.

STATE OF OHIO,
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ON PETITION FOR WRIT OF CERTIORARI TO THE
OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review the instant matter.

The questions herein presented were raised in the Ohio Court of Appeals of Cuyahoga County, and the Supreme Court of Ohio.

The Ohio Court of Appeals, Eighth District, unanimously affirmed the petitioner's conviction. Likewise, the Supreme Court of Ohio overruled Petitioner's Motion for Leave to Appeal and further denied Petitioner's Motion for Rehearing.

The Ohio Courts decided this case in accordance with the statutes of the State of Ohio, the Constitution of the United States and the applicable decisions of this Court.

No substantial federal question is presented by the instant Petition for Certiorari.

HISTORY OF THE CASE

On July 26, 1983, Petitioner, William Elizey, was charged in a five count indictment with Grand Theft, in violation of Ohio Revised Code Section 2913.02; Forgery (two counts) and Uttering (two counts), in violation of Ohio Revised Code Section 2913.31. At the close of the State's case, the court granted Petitioner's motion for a directed verdict of acquittal as to one count of Forgery and one count of Uttering. On July 3, 1984, the jury found the petitioner not guilty of Forgery, but guilty of Grand Theft and Uttering. Elizey's co-defendant, Lawrence Williams, was found guilty by the same jury of Grand Theft, Forgery, and Uttering. On August 13, 1984, Elizey was sentenced to three concurrent terms of six months imprisonment.

STATEMENT OF THE FACTS

The Grand Theft alleged a scheme in which Petitioner aided and abetted co-defendant Lawrence Williams ("Williams") in obtaining $13,103 belonging to Elizey's employer, Picker International Corporation ("Picker"). Petitioner was employed by Picker as a senior buyer from June of 1980 to February, 1983. Picker was under contract with the University of California at San Francisco to construct and install a digital angiography room in the Radiology Department of Moffit Hospital. One item of equipment required in the digital angiography room was a Model 401 4-Channel Ultrasonic Dimension System ("401"). In August of 1981, Petitioner, in his position as senior buyer, ordered a 401 from Schuessler and Associates of Cardiff By The Sea, California. Petitioner bought it at a cost of $3,540 to Picker. It was delivered to Moffit Hospital and is still being used there. On November 24, 1981, Petitioner issued Picker purchase order No. B 84117 to Spectrum Instrument Company, a company owned by co-defendant Lawrence Williams, for a second 401. Petitioner met Williams in 1980 when he was looking to buy a house in Cleveland. Williams, who is also a real estate agent, assisted him in finding a place to live. It was only after Williams met Elizey that his company, Spectrum Electronics, began to do business with Picker. Spectrum did between $50,000 and $75,000 worth of business with Picker in 1981 and 1982, and in 1983 did about $80,000 worth. Williams' main contact with Picker was Petitioner. The purchase order shows that the second 401 was requisitioned by John Volpe on Requisition No. 33486; that the unit price for the item was $12,465; and that

it was to be shipped to Moffit Hospital, Radiology Department, University of California at San Francisco. Volpe testified that he never requisitioned a second 401. Jane Quentin, Administrator of the Radiology Department, testified that a second 401 was neither ordered nor received by the Radiology Department. Spectrum Instruments was paid $13,103 for the phantom 401. A search of the records at Picker revealed that requisition form No. 33486 was still in the requisition book, unused. Petitioner, in addition to his testimony that the second 401 was requisitioned by Volpe, testified that he was told by Dr. Michael Tesic of Picker that Dr. Margolis of Moffit Hospital wanted a back-up 401 in case the one purchased from Schuessler failed to perform. Tesic denied any such conversation and denied that a back-up 401 was ever envisioned or required by the contract.

The Uttering conviction involved an invoice from Spectrum on which co-defendant Williams forged the writing of another without his consent. Petitioner was alleged to have aided and abetted Williams in the uttering of this forged document. Williams wrote on a copy of the original invoice from Spectrum the following words: "Received on 4/6/82 Dr. Lionel Davidson". No doctor with that name was ever employed or associated with Moffit Hospital. With this forged writing to back him up, Petitioner wrote on the original invoice from Spectrum the following words, "Okay to pay". This was done on May 3, 1982, and on June 2, 1982, Picker issued the check for $13,103 to Spectrum. The check was endorsed and negotiated by Williams.

REASONS FOR DENYING THE WRIT

1. The State presented sufficient evidence to establish each element of the crimes charged beyond a reasonable doubt.

Petitioner's first two claimed errors involve the same issue and can be discussed together.

> A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St. 2d 169.

We are not to weigh the evidence or to attempt to assess the credibility of the witnesses. The jury has already done this. We are to review the record and determine whether there is substantial evidence, regardless of who produced it, to support the jury's verdict.

We must also keep in mind the dictates of *State v. Kulig* (1974), 37 Ohio St. 2d 157. *Kulig* held that where a conviction was supported solely by circumstantial evidence that the evidence must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt.

A review of the record finds the jury verdict to be supported by substantial circumstantial evidence. Moreover, this Court will not involve itself with factual issues.

2. A trial court may interrogate witnesses in an impartial manner.

Petitioner argues that the trial court's questioning of witnesses constitutes prejudicial error. Rule 614(B) of the Ohio Rules of Evidence provides:

> The court may interrogate witnesses in an impartial manner, whether called by itself or by a party.

Clearly, the court is authorized to question witnesses, provided that it is done in an impartial manner. If counsel believes that the court is not conducting the interrogation in an impartial manner, or that the interrogation in some way violates the defendant's right to due process, Rule 614(C) provides counsel with a method of objecting to the court's interrogation of witnesses. It relaxes the usual procedure for making objections and allows counsel to wait until the "next available opportunity when the jury is not present". Petitioner's alleged error must fail for two reasons: First of all, counsel did not avail himself of the unique opportunity offered him by Rule 614(C) and failed to object to the court's questioning of the witnesses. Secondly, his failure to object is immaterial because the court's interrogation was conducted in an impartial manner and could have been of assistance to the jury in understanding testimony which, at times, was complicated and highly technical. In this case, we believe the trial judge should be commended, not condemned, for his determination in attempting to get to the truth of the matter.

CONCLUSION

The Respondent, State of Ohio, submits that the Petition herein fails to present any question of constitutional dimension justifying review by the Court. The Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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